

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

UNITED STATES OF AMERICA,     )  
  )  
                          Petitioner,     )  
  )  
                          V.                     ) 5:08-hc-02095-BO  
  )  
JOSEPH AARON EDWARDS,         )  
  )  
                                  Respondent. )  
  )  
\_\_\_\_\_ )

MOTION HEARING  
APRIL 7, 2011  
BEFORE THE HONORABLE TERRENCE W. BOYLE  
U. S. DISTRICT JUDGE

**APPEARANCES :**  
**FOR THE GOVERNMENT :**

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COURT REPORTER: REBECCA L. CRUNK  
STENOTYPE WITH COMPUTER AIDED TRANSCRIPTION

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(The proceedings began at 1:30.)

THE COURT: We're in session in the Edwards case. It was set for trial on March 28th, and on the 24th, which I believe is a Thursday, I think that's the right date, the Government dismissed it, and I signed the order either on the 24th or -5th. Isn't all that true?

MS. PEARCE: Yes, your Honor.

THE COURT: Okay. And you made mention at the hearing on the 28th that there was a report that you believed that you had. I interpreted it to mean you had the report that had been done either in October or September, if I got it right, that was favorable to the detainee but not disclosed to until some later time.

MS. PEARCE: I believe it was disclosed on that Wednesday, and I have the report --

THE COURT: Well, just hold on to it and let me go through this dialogue. And so Wednesday would have been the 23rd, and that's when you got -- and then the 24th the case was dismissed.

MS. PEARCE: Yes.

THE COURT: And the report was by a psychiatrist?

MS. PEARCE: A Bureau of Prison psychologist.

THE COURT: Psychologist. And the report would have been favorable to Edwards in terms of his not being found to be sexually dangerous or suffering from a major medical disorder.

1 MS. PEARCE: Yes. If I may quote that Dr. Demby opines  
2 that Mr. Edwards does not meet criteria as a sexually dangerous  
3 person as defined of under 18 U.S.C. 4248.

4 THE COURT: And what's the date of that report?

5 MS. PEARCE: September 22nd, 2010.

6 THE COURT: Have you made any discovery requests or  
7 requests for the production of favorable material?

8 MS. PEARCE: I believe we had issued a general discovery  
9 request, and I would have expected this to be a part of that  
10 discovery. I believe the Government's discovery deadline was in  
11 early October, and that's why this was a little unsettling to  
12 have it not materialize until March.

13 THE COURT: Right. If this had been a criminal case and  
14 you had made a Brady request, that would have been Brady  
15 material, and it would have been subject to disclosure by the  
16 Government to the defendant whenever the request was made; isn't  
17 that correct?

18 MS. PEARCE: Yes, your Honor.

19 THE COURT: All right. And that's what I'm struggling with  
20 is to what extent the principles of Brady bleed into 4248 where  
21 the Government is acting in a custodial setting and liberty is  
22 involved, and the Government is prosecuting the case with the  
23 burden of proof, and the Government has evidence that it  
24 receives either by creating it or recovering it during the  
25 process that tends to exonerate or support release of the person

1 whether the Court ought to fashion a rule that upon request, the  
2 Government has to provide that because in the civil context, the  
3 Government can invite a lot of inquiry, do as many analysis or  
4 opinions as it wants and only cherry pick the ones that fit if  
5 there's no compulsory disclosure requirement.

6 MS. PEARCE: You know, your Honor, I'm on shaky ground when  
7 it comes to civil process, I will admit, but I thought if a  
8 report were prepared under the civil rules, it should have been  
9 produced, but I would defer to --

10 THE COURT: Well, I don't know if it had to be produced if  
11 you didn't ask for it.

12 MR. ACKER: Actually, your Honor, it did.

13 THE COURT: Okay.

14 MR. ACKER: The standing order requires -- has a list of  
15 things that we are required to produce whether they're asked for  
16 or not, and I don't believe there was a discovery request, but  
17 we had the obligation to provide it under the standing order,  
18 and the standing order is very specific about what we have to  
19 provide, and it includes all medical and psychological record in  
20 possession of the Bureau of Prisons of the Government, the  
21 section offenders aid in the records in the possession of the  
22 BOP of the Government, the central file for the respondent, the  
23 JNC file for the BOP file and all documents reviewed by the  
24 examiners designated by the Government or any other expert  
25 identified by the Government as well as any other documents

1 under the general civil rules for initial disclosures.

2       So, your Honor, if we had, in one of those categories,  
3 information whether it's helpful to us or helpful to them, we  
4 have the obligation to turn it over. The reason it didn't  
5 happen in this particular case, your Honor, was that, as your  
6 Honor knows, these documents are voluminous and so it takes a  
7 little bit of time for the Bureau of Prisons to scan all these  
8 documents electronically, they then deliver a disk of those  
9 documents to the U.S. Attorney's office. We then electronically  
10 Bates stamp those documents and provide them to the respondent's  
11 attorney.

12       In this case the documents from the Bureau of Prisons were  
13 delivered to us on -- from the Bureau of Prisons to the U.S.  
14 Attorney's office on September 9th. We began processing them on  
15 September 10th, and we produced them to the respondent on  
16 October 4th.

17       THE COURT: But you didn't produce this report.

18       MR. ACKER: We did not, your Honor, because what happened  
19 was this report was produced after the Bureau of Prisons gave us  
20 the documents to process --

21       THE COURT: Right.

22       MR. ACKER: -- and before we produced the initial  
23 disclosure. So we didn't know about it, and as soon as we found  
24 out -- we found out about it because we also have the obligation  
25 to supplement our disclosures, and so in preparation for

1 trial --

2 THE COURT: Yes.

3 MR. ACKER: -- we went out to look to see if anything had  
4 been added --

5 THE COURT: Right.

6 MR. ACKER: -- and in fact we discovered that this had been  
7 added.

8 THE COURT: Well, I have no -- I have no particular  
9 insight, but correct me if I'm wrong, and I'm not being  
10 accusatory at all, but had this been a case assigned to a  
11 different judge who was not -- who had not set it for trial on  
12 March 28th, the information might not have been discovered. It  
13 might have been accidentally or it might not have been. It was  
14 the preparation for trial that triggered a more careful  
15 examination and the discovery of this information and the  
16 release of it.

17 MR. ACKER: That is true, your Honor.

18 THE COURT: Okay. So that's something that we obviously --  
19 it creates a profound problem for the Court and for the lawyers  
20 who were involved here. Again, I'm not throwing any stones.  
21 I'm not trying to assign any responsibility at all, but, you  
22 know, the Public Defender and the Comstock experience, some of  
23 these people were started in the fall of '06 and then '07 and  
24 '08, and none of them have been tried, none, zero have been  
25 tried.

1        So if it's the bringing them into a courtroom in front of a  
2 District Judge and calling the case for trial that will only  
3 result in the disclosure of exculpatory material, then they all  
4 should have been set for trial sometime in December of 2006, and  
5 I think that some of the criticism that's coming from the  
6 appellant court now is that you didn't do this, and nobody --  
7 everybody sat on their rights hoping that it will go away, and  
8 it didn't go away.

9        And so there are people who are -- I almost -- I sound  
10 preachy. I'm not trying to be preachy. These are just facts.  
11 There are people who have been in jail two, three, four years  
12 who were, like -- were released.

13        Let me keep going because, you know, I've got all these  
14 things that are relevant to case. I brought Edwards in here the  
15 first time. He's an Apache Indian. He comes off a reservation.  
16 We brought him in here. We know in our preparation for an order  
17 what the date was, but it was sometime earlier in time. He  
18 didn't have an interpreter so we had to bring him back. We got  
19 the interpreter from the Apaches who came, and then it turns out  
20 he didn't need the interpreter.

21        And so he had several schedulings that brought him current  
22 into this room and none of those produced an examination of the  
23 record that would have given up this information upon which,  
24 apparently, you acted and let him go to supervised release.

25        And this is exactly what Broncho was about. I mean, the

1 heart of the ruling in Broncho is that this is the way you  
2 should be doing it, but it's not going to happen because you're  
3 just get remanded it, and it's going to get lost in the shuffle.

4 And hold on. I'll collect my thoughts. Oh, yeah, the  
5 thing that is unspoken and unresolved is apparently he was  
6 certified. He had to be certified, and I've read Edwards'  
7 certification and on that showing, he's detained. He doesn't  
8 participate in anything. There's nothing that he does to alter  
9 the condition that he's in through these years in the BOP, and  
10 now he's okay, and I think that's a matter of some concern how  
11 he could be certified, unchanged and now the Government's  
12 position is, no, he's capable of being released into society  
13 with supervised release. And his supervised release terms  
14 haven't changed. They're whatever he had coming out of the  
15 criminal process. That's the point I'm trying to make in  
16 Broncho, you know, that you have a criminal judgment that's  
17 entitled to dignity and enforcement, and now the Government  
18 says, yeah, that's right with Edwards even though for however  
19 many years, we didn't agree with that.

20 Nobody cares and nobody looks. There's no ACLU jammed in  
21 this room. The News and Observer and the ABC news aren't here.  
22 Nobody cares. But the Government's got a serious obligation  
23 here, I mean, both ways, to keep dangerous people off the  
24 streets, and that's a valid legitimate mandate, but not to keep  
25 people off the streets in an architectonical kind of thing where

1 they're just dropped out of society for years until somebody  
2 sets it for trial.

3 MR. ACKER: Your Honor, there are three things that the  
4 Government has done to try to address the concerns that -- the  
5 valid concerns your Honor has raised. One is to try to make  
6 sure that the specific instance in Edwards doesn't happen again  
7 as we have gone back out to the Bureau of Prisons and tried to  
8 reinforce with the psychologists out there that if they issue  
9 another opinion, that they need to give that to us, and they  
10 need to give that to us immediately so that that won't happen  
11 again.

12 The second thing is that your Honor is not -- the other  
13 time that we look for exactly this sort of situation, either  
14 information that we didn't have or change of opinions by the  
15 psychologists or whatever, we are looking at that again as each  
16 case comes up for review. And it's not when it's set for trial.  
17 It's earlier than that as each time that we are producing the  
18 reports to the other side.

19 THE COURT: I know that you dropped two people this week,  
20 one of Judge Dever's, one of Judge Flanagan's I think. You  
21 dropped another one of mine earlier in time, so counting  
22 Edwards, that's four that I know about recently, and then Judge  
23 Dever had one dropped earlier, that's five.

24 So I know of at least five who no change having taken  
25 place, they're not in therapy, they're not proactively trying to

1 respond, who you later said the certification was not defensible  
2 and you let the petition -- you let them go under supervised  
3 release so the certification couldn't be defensible otherwise  
4 you should stick to it.

5 MR. ACKER: Well, your Honor, I think that there are issues  
6 of prosecutorial discretion that we're using as well. That  
7 doesn't mean it's not necessarily not defensible, but that may  
8 be a close case that we decide that the conditions for --

9 THE COURT: No. I can't agree that that's the kind of --  
10 it's not like you, as a prosecutor, can round up people, hold  
11 them in a pen and then over time decide which ones to bring  
12 forward with criminal charges, and that's what's happening here  
13 because there's no front end scrutiny by the Court.

14 MR. ACKER: Well, that's true. There's not a scrutiny by  
15 the Court.

16 The other thing that's happened, your Honor, is that since  
17 the time that some of these respondents were certified, the  
18 science continues to develop and there was a change --

19 THE COURT: But the law doesn't say -- the law doesn't say  
20 you can round -- you can detain everybody who the science now is  
21 sustats (ph), but if the science changes, no due process  
22 involved, just let them go.

23 MR. ACKER: No, your Honor, but if the opinion originally  
24 was that they met the criteria and upon re-evaluation, they  
25 don't --

1 THE COURT: Well, would you be willing to agree that the  
2 Adam Walsh Act is unconstitutional for Vegas now?

3 MR. ACKER: No, your Honor.

4 THE COURT: Well, isn't that about what you just said?

5 MR. ACKER: No, your Honor.

6 THE COURT: If the science is migrating and the science is  
7 imprecise, it would be like saying, you cannot steal, but you  
8 can borrow, but sometimes if you keep it too long after you  
9 borrow it, that's really stealing so, you know, we'll have to  
10 worry about the crime after the fact. You know, that's what it  
11 sounds like.

12 MR. ACKER: That certainly is not what I intended to say.

13 THE COURT: Well, I know, but a critical mind might say,  
14 wow, vagueness. You know, you can't have a crime or a detention  
15 that so -- a law that's so vague that no one knows what it  
16 means. So if you can't tell because the science is yet in  
17 development who is certified and who is not certified, huh,  
18 seems like that's a little unconstitutional. And no one's ruled  
19 on that yet because no one's been able to penetrate through into  
20 the science. We're still enveloped in the procedures of the  
21 science laying back there as the big dragons in the back.

22 MR. ACKER: Well, your Honor, there have been others that  
23 dealt with science and numerous --

24 THE COURT: On 4248?

25 MR. ACKER: The numerous science that have dealt with the

1 science in the State courts, and there have been several courts,  
2 one in Hawaii, one in Iowa and several cases in Massachusetts in  
3 Federal Court dealing with 4248, yes, your Honor, and there's  
4 been at least one that I know of amended in Massachusetts under  
5 4248.

6 So the science -- and those were, like, two-week trials,  
7 your Honor, where the science was highly contested, but the  
8 Court ultimately found that, yes, in some instances -- which is  
9 to be expected, in some instances, the Government was able to  
10 meet its burden, and some instances the Government was not able  
11 to meet its burden which would happen in any -- in criminal  
12 cases, in civil cases. And -- but the fact that the Government  
13 uses good faith is re-examining some of these and deciding that  
14 we should in fact release them.

15 THE COURT: Yeah. But the problem that I think that is  
16 embedded in this is that you're never in front of a judge. You  
17 don't have these people in front of a judge with having to  
18 defend the position that you're in at that time.

19 MR. ACKER: I understand, your Honor. And all I can say is  
20 Congress didn't write the law that way, and that's what we're  
21 stuck with.

22 THE COURT: That's true.

23 MR. ACKER: But we have made every effort to try --

24 THE COURT: I cut you off. I want you to be entitled to  
25 finish what you were saying about your compliance.

1 MR. ACKER: The first is that we've made sure that we've  
2 spoken to the psychologists so that they know that if they are  
3 providing a report to give it to us immediately so that we can  
4 deliver it, and any report that is written by the BOP  
5 psychologists, we will turn over.

6 The second thing we have done is to review these -- not  
7 wait just for trial, but reviewing them as we are producing the  
8 initial disclosures and that has resulted in I don't know how  
9 many, probably six, seven, eight, something like that of the --

10 THE COURT: Dismissals.

11 MR. ACKER: -- 95 --

12 THE COURT: Turned into supervised release.

13 MR. ACKER: That's correct, your Honor. Then -- I had one  
14 other point, but I've lost my --

15 THE COURT: That's my fault.

16 MR. ACKER: But that's the main thing, your Honor, is that  
17 we are doing our best to make sure that that does not happen  
18 again.

19 I would say, your Honor, I do not think that there is an  
20 obligation under Brady. I don't believe there's a  
21 constitutional obligation to turn things over. The obligation  
22 we have is the obligation from the standing order of the Court  
23 obligating us to anything that's in the Bureau of Prisons' files  
24 we have to turn over.

25 So if there is some exculpatory material in the Bureau of

1 Prisons' files, yes, we have to turn it over, but if we  
2 consulted with somebody -- some other expert who says, you know,  
3 this something, for whatever reason, we're not obligated to turn  
4 that over. The civil rules make very clear that if we don't  
5 designate that person as an expert that we don't have to turn  
6 that information over.

7 THE COURT: Right. Your position is, and I don't disagree  
8 with you at all, that the obligations you have now spring from  
9 rules of practice in this court, and they're court generated,  
10 not necessarily constitutional or not constitutional at all as  
11 you see them.

12 But that leaves unanswered a situation where you might have  
13 a variety of opinions and picked those that worked for you and  
14 ignore those that don't work for you because you're an advocate,  
15 and you've already got a case in progress, and you've certified  
16 the person that you want to prevail at the -- at your hearing,  
17 and the detainee would never know what the outcome was of the  
18 opinions in evidence that he didn't see or didn't even know  
19 existed.

20 MR. ACKER: That's correct, your Honor.

21 THE COURT: Well, you couldn't do that in a criminal  
22 setting. You couldn't send out a squad of investigators, have  
23 some come back and say he did it and some come back and say he  
24 didn't do it.

25 MR. ACKER: That's correct, your Honor.

1 THE COURT: And then hide the ball and only give you the  
2 ones that said he did it.

3 MR. ACKER: That is absolutely correct.

4 THE COURT: And that's where I'm going. I'm not going to  
5 pull any punches with you. I think that constitutionally  
6 because of the loss of liberty and the context of this as being  
7 either criminal, quasi criminal or as close to criminal as civil  
8 can get, whatever you want to call it, that a rule needs to be  
9 put in place. I'm going to do it. It will only apply in my  
10 cases.

11 And do you want to add anything to this case or discussion?  
12 You see, I think Edwards is the appropriate case to make a  
13 ruling in because it's the one that had the fact problem.

14 MS. PEARCE: I think you're correct, your Honor. And I  
15 think it would be important certainly for the Government to work  
16 very closely with the psychology staff within the Bureau of  
17 Prisons to not only forward any formal reports but any notes  
18 that are developed especially whenever their internal cutoff  
19 dates are because even within those notes I can tell from this  
20 case that there occasionally some notes that have detrimental  
21 inclination.

22 I think, if I understand the standing order correctly, it  
23 defines only an obligation. Once that certificate is filed, the  
24 Government should remain under an ongoing obligation to keep  
25 producing. There should be no internal cutoff when they deliver

1 stuff and how big it is. It should be continuous.

2 THE COURT: Well, Mr. Acker, I think you know from your  
3 long experience that, correct me if I'm wrong, in the criminal  
4 context of Brady, somebody makes a Brady request, the judge  
5 doesn't run over to your office and start pulling out papers in  
6 your file to see if there's any Brady in there. You're under a  
7 good faith obligation to disclose and many, many, many times, if  
8 not for journey's sake, I've looked at everything in my file.  
9 You have everything that could be considered Brady and there's  
10 nothing else. And they say, well, we think there is. And you  
11 say, well, there isn't and I certify that and the Court says  
12 fine. The Government certifies it, that's the answer. Isn't  
13 that --

14 MR. ACKER: Yes, your Honor. That's my understanding.

15 THE COURT: And I think that that would be the case here.  
16 If you have the obligation, then you comply with it and say I  
17 complied with it.

18 MR. ACKER: And I would agree that we have a continuing  
19 obligation. I think practically, and I think courts have  
20 understood this, that, especially in a civil context, that that  
21 is a periodic obligation. We have a periodic obligation to look  
22 at such reasonable periods of time in supplement, just as they  
23 have an obligation to supplement any information that they have  
24 that they are going to give to us.

25 And I did raise that because it did come up in the Edwards'

1 case that there was information about a witness that they  
2 planned to call to trial. I think the order said that they're  
3 supposed to disclose that to us as part of their initial  
4 disclosures, and they're supposed to supplement periodically.  
5 And we didn't find out about that witness until we called the  
6 witness to get some documents, and he said, well, I'm bringing  
7 them to trial. I've been subpoenaed. And we weren't copied  
8 with the subpoena, we weren't notified.

9       So I think both sides are working under extreme  
10 circumstances. We're learning as we go along, doing the best we  
11 can. I don't think we're connecting in part. I'm just pointing  
12 out that the obligation to supplement is reciprocal and the  
13 obligation to periodically update disclosures is reciprocal, and  
14 we acknowledge that we didn't do it as quickly as we should have  
15 in the Edwards' case.

16       THE COURT: Again, I'm not finger pointing. I agree with  
17 you that we're all trying to improve and resolve our procedures  
18 and practice in this hearing.

19       MS. PEARCE: Likewise, your Honor, if I may, I think if  
20 we'd had this report -- well, there are two issues. One is, it  
21 really is the very specific procedural history of Mr. Edwards'  
22 case that left to an internal decision to withdraw the motion  
23 for appointment containment because basically we had never  
24 gotten authority -- the original order of appointment did not  
25 authorize Mr. Edwards to seek an independent examiner. When Mr.

1 Edwards filed a motion for a hearing, he requested an  
2 appointment with an independent expert and following his motion  
3 for hearing was granted, the motion for the independent expert  
4 was not.

5 At the end of the day, the January order came out and from  
6 a strictly legal perspective, I do not know whether this Court  
7 is absolutely bound by the January order, but I do know that it  
8 was in Mr. Edwards best interest to go ahead and select an  
9 examiner to go through an examination because actually,  
10 internally, by the time I got this case, I thought it was thin  
11 and needed to rev it up.

12 We've had these intermittent status conferences, and I did  
13 not bring my dates -- the date sequence, but at the status  
14 conference in which they -- the Government notified us that it  
15 was one, we said we will rely on one examiner at this level, but  
16 we did this selection of an independent examiner without the  
17 direct authority as anticipated through 18 U.S.C. 4247, and  
18 that's why we filed that motion because we had acted without  
19 direct order from this Court.

20 We realize, your Honor, the standing order was in place,  
21 but, again, we are, and certainly Mr. Acker, we are finding our  
22 way through this process.

23 And if I can address two housekeeping items that would help  
24 and are part of this motion. One is, when you go to file under  
25 ECF, there is no option to pick a notice of court examiner, and

1 I believe the paralegals in our office use a filing cross, and  
2 it's wonderful, have been instructed to file the independent  
3 reports under as a -- under the nomenclature of the filing of  
4 the status book.

5 As I also alluded to you last time, in my practice of  
6 independent experts, and I realize the standing order is  
7 unclear, but the way I see it and I believe the way our office  
8 sees it is that we would have a right as the respondent's  
9 counsel to hire our own expert. We also ask under the statutes  
10 for the appointment of an independent expert and that expert in  
11 fact can communicate with either side. Now, the standing order  
12 is not entirely clear on this, but that's how I operate.

13 As I said, we went ahead and -- with Dr. Singer, but we  
14 realized that we were preparing to defend this, that this was  
15 procedurally for us a difficult case if we had not gotten  
16 authority from the Court's decision.

17 THE COURT: Well, I don't know if I'm answering your  
18 questions, but the standing order doesn't bind cases in this  
19 court. The standing order only provides to those who want to  
20 conform to it, and I don't -- I didn't adopt it and so work my  
21 way through my own cases. And as far as I'm concerned, you had  
22 the authority to hire the expert, and I'm going to allow the  
23 payment of it through the court budget not the U.S. Attorneys.  
24 I'm going to end up ruling that the payments need to be  
25 authorized, the CJA fund, not the Government. The Government's

1 got it's own obligations and is going to pay for it. I can't --  
2 that is my cases and maybe beyond, and this is my belief policy  
3 wise that it's better to have that funding go through the CJA  
4 budget rather than go through the executive department. That's  
5 not what you asked for at the earlier hearing. I think you  
6 wanted to charge the Government.

7 MS. PEARSON: If the moment of practice in the 18 U.S.C.  
8 4241 sequence that the Government pay for the majority of  
9 services provided by the court appointed. If we are to hire an  
10 expert, we will go through our internal funding, but if we ask  
11 the Court to appoint an independent expert, overruled our only,  
12 quote, control over input is the selection, we are bound by  
13 whatever that expert's opinion is for better or for worse, that  
14 authority that has been presented in our motion would be the  
15 responsibility of DOJ. And I think we have some strong  
16 arguments why CJA funds should not be used, but at this point,  
17 your Honor, I would have to defer to that order prepared by if  
18 you want to hear from me on that.

19 THE COURT: Well, okay. But it's not just your Public  
20 Defender represented cases, it's family cases, too.

21 MS. PEARCE: Exactly.

22 THE COURT: So when they have an independent psychiatrist,  
23 they're going to have to seek funds to pay for that person.

24 MS. PEARCE: Yes, your Honor. They need funds and go  
25 through the same mechanism that the Federal office does in this

1 practice to present the bills to the U.S. Attorney's office for  
2 the independents. And I think what's important to understand,  
3 as of the defense attorneys, we have a choice of hiring our own  
4 expert with FTD funds or CJA panel funds for the panel  
5 attorneys. When we, as panel attorneys, ask the Court under the  
6 authority 23 7B to authorize the appointment of an independent  
7 examiner, traditionally, that has been in past practices, I  
8 believe, under that that DOJ would pay for such examination and  
9 subsequent report.

10 THE COURT: And you don't want to do that, right? That's  
11 where you're resisting.

12 MR. ACKER: Yes, sir.

13 THE COURT: Okay. Again, long story short, I think that  
14 the CJA ought to pay for that, and I agree with the Government  
15 on that. I'm sure that the appellant court would be delighted  
16 to screen that out and make another opinion on it. I don't know  
17 when they'll get around to that, but so in my cases, I'm going  
18 to authorize payments from the CJA, not from the U.S. Attorneys'  
19 funds.

20 Let me ask you this before we finish: In the 4246s, do you  
21 ever have this Brady like issue arise where there's undisclosed  
22 but exonerating information?

23 MS. PEARCE: In response to the question, your Honor, no.  
24 What happens is when the certificate is filed, it is accompanied  
25 by the report signed off by the team, consists of the

1 psychiatrist and the psychologist, which nomenclature would be  
2 important here, traditionally, the Government has attached the  
3 petition, I believe, that may be considered this Court's first  
4 expert although it was prepared by BOP as the Government's  
5 expert.

6 But in any event, the actual evaluation by BOP, 35 pages,  
7 is attached to laying out why the full legal report for this  
8 4246 petition.

9 THE COURT: So it's not an adversarial process. Is that  
10 what you're saying?

11 MS PEARCE: No, I'm not saying that. That when the  
12 Government goes to certify, they deliver a fully developed  
13 psychiatric record. Then the independent is selected by the  
14 respondent and instructed to report following the guidelines set  
15 forth in 4247, they get that report, they go out to Butner and  
16 see the client and review the BOP records, and then that report  
17 is submitted when it's complete. Occasionally -- more often  
18 than not, the independent tends to agree with that first  
19 evaluation, but, unlike 4248, it's not to prepare a certificate.  
20 It's a fully developed report. And that's our position.

21 MR. ACKER: And, your Honor, there have been different  
22 periods of time when the BOP on 4248 cases have done the same  
23 thing and has not done the same thing. The statute doesn't  
24 require it, and it's my understanding that perspectively and for  
25 maybe the last year or so all new 4248 cases will also have that

1 full report.

2 THE COURT: So the certificate will be much more thorough  
3 and comprehensive. Is that what you're saying?

4 MR. ACKER: The certificate may or may not be, but it will  
5 be accompanied by a -- it will be a full forensic evaluation  
6 done.

7 THE COURT: Which didn't happen in the 206 and 207 ones.

8 MR. ACKER: I can't exactly be sure, but there was a period  
9 of time, yes, your Honor, where that was not being done.

10 THE COURT: Some of them were bare bones certifications  
11 that were later supplemented.

12 MR. ACKER: That is true. So I think that I would agree  
13 with Ms. Pearce that we don't think we have that problem in the  
14 4246 cases, and hopefully, respectively, we won't have that in  
15 the 4248 cases.

16 THE COURT: And that's why we haven't had any litigation  
17 happening.

18 MS. PEARCE: That's correct, your Honor.

19 THE COURT: So there's no case law on that.

20 MS. PEARCE: There's no case law on that because it flows  
21 in a very natural rhythm and for a -- it's a much shorter time  
22 period. Once that petition is filed with that accompanying  
23 document, it allows us to contact the underlying criminal  
24 attorneys with those records. We can give all the materials  
25 independent, and it's a much more streamlined process.

1 MR. ACKER: And our hope also is, your Honor, again, we're  
2 not there yet, but I hope that BOP's goal is eventually to get  
3 to the point where it can certify these people six months prior  
4 to their release so that all litigation or possible litigation  
5 has taken place prior to the appearance of the cases. The  
6 nature of Congress in passing this and the Bureau of Prisons  
7 having to rush different things, we're not there yet, as well as  
8 the appellant litigation delaying it, but I think in the long  
9 term, that'll be much more efficient.

10 THE COURT: There's a certain issue on Comstock, too,  
11 that's filed; is that right?

12 MR. ACKER: That's correct.

13 MS. PEARCE: Yes.

14 THE COURT: Just recently filed?

15 MS. PEARCE: Yes. It was filed and, your Honor, to let you  
16 know, the Government has filed a motion to extend the time to  
17 respond.

18 THE COURT: So the Government's awaiting a response before  
19 they rule on its 24-hour cert.

20 MS. PEARCE: The Government --

21 THE COURT: The Government will have a response and then --

22 MS. PEARCE: They've indicated they want more time --

23 THE COURT: -- typically and then the petition will lay  
24 over and either be granted or denied.

25 MR. ACKER: And I believe -- I know the Public Defender is

1 not on the Timm's (ph) case, but I think that I heard that they  
2 have also asked for a certified --

3 THE COURT: As to a certain issue.

4 MR. ACKER: Yeah. I -- that's what I was told. I haven't  
5 seen it myself, your Honor.

6 THE COURT: Who is representing Timms now, the same lawyers  
7 that were in the District Court?

8 MR. ACKER: I believe so, your Honor. They represented him  
9 in the 4th Circuit.

10 THE COURT: All right. Is there anything else we need to  
11 touch on in this court case? Ms. Little, you wanted to argue  
12 about the costs?

13 MS. LITTLE: I was going to argue the law, but if your  
14 Honor already ruled -- that's a good reason not to --

15 THE COURT: The law --

16 MR. ACKER: Judge, Ms. Little and I are the estoppel  
17 attorneys in the Hall matter which you had scheduled for trial  
18 for I think it's May 9th right now and --

19 THE COURT: No. I reset it. I saw your written documents.  
20 I just set it for June 2nd or June 4th.

21 MS. LITTLE: Your Honor, we filed a motion yesterday  
22 requesting June 20th.

23 THE COURT: I know. I read that and I think I set it for  
24 maybe June 6th.

25 MS. LITTLE: Our problem, your Honor, is our experts are

1 not available. The experts that are recorded experts for right  
2 now --

3 THE COURT: My problem is I'm not going to try it June the  
4 20th.

5 MS. LITTLE: June 20th is when all of our experts are --

6 THE COURT: Yeah, but I'm not going to --

7 MS. LITTLE: You're not available.

8 THE COURT: I'm not going to do it then.

9 MS. LITTLE: We have a problem in all of our experts are in  
10 cases all over the country and to try and get --

11 THE COURT: Yeah, but I set it for June 6th, and if that's  
12 a problem, we can deal with it, but these things tend to work  
13 themselves out.

14 MS. LITTLE: Well, both the prosecutor and I thought if we  
15 got together with our experts, got on calendar --

16 THE COURT: I know, but I don't -- suppose the Court of  
17 Appeals wanted to argue it next Monday. You think you could  
18 call them up and say, well, we're not all in agreement on that.

19 MS. LITTLE: Well --

20 THE COURT: They'd say no, you are in agreement.

21 MS. LITTLE: That's true, your Honor.

22 THE COURT: Well, let's just -- I'm not going to -- I'm not  
23 going to do it on the week of the 20th, and I'm not going to set  
24 it in July. That sends a bad message. I was looking for a time  
25 to do it in April or May, and so that's the best you're going to

1 do.

2 MR. ACKER: Thank you, your Honor.

3 MS. LITTLE: Thank you.

4 THE COURT: It'll all work out. Anything else?

5 MR. ACKER: No, your Honor.

6 THE COURT: Thank you all very much for coming back and  
7 sharing your thoughts.

8 Take a brief recess and do the Defenders of Wildlife next.

9 (The proceedings ended at 2:12 p.m.)

1  
2 CERTIFICATE

3 THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF  
4 PROCEEDINGS TAKEN AT THE CIVIL SESSION OF UNITED STATES DISTRICT  
5 COURT IS A TRUE AND ACCURATE TRANSCRIPTION TO THE BEST OF MY  
6 ABILITY OF THE PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND  
7 TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

8 THIS THE 13TH DAY OF APRIL, 2011.  
9

10 /S/ REBECCA L. CRUNK

11 REBECCA L. CRUNK  
12 COURT REPORTER  
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